

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

STATE OF UTAH,
STATE OF TEXAS,
STATE OF ALABAMA,
STATE OF ARKANSAS,
STATE OF IDAHO,
STATE OF INDIANA,
STATE OF IOWA
STATE OF KANSAS,
STATE OF LOUISIANA,
STATE OF MISSOURI,
STATE OF MONTANA,
STATE OF NEBRASKA,
STATE OF SOUTH CAROLINA,
STATE OF TENNESSEE,
STATE OF WEST VIRGINIA, and
NATIONAL ASSOCIATION OF HOME BUILDERS
OF THE UNITED STATES,

Plaintiffs,

v.

SCOTT TURNER, in his official capacity as
Secretary of Housing and Urban Development;
U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT; BROOKE ROLLINS, in her
official capacity as Secretary of Agriculture; U.S.
DEPARTMENT OF AGRICULTURE,

Defendants.

No. 6:25-cv-1

PLAINTIFFS' OPPOSED MOTION FOR FORFEITURE

Plaintiffs move that the Court find that Defendants have forfeited any arguments based on the late-filed 52 volume Supplemental Certified Administrative Record.

BACKGROUND

This is a challenge to HUD and USDA's decision to apply new energy efficiency standards promulgated by two private organizations to agency-financed housing. On May 27, 2025, the Defendants filed the Certified Administrative Record ("CAR"), consisting of four volumes with 7,032 pages. ECF 38. The accompanying certification made no reference to the filed CAR being partial or incomplete. ECF 38-1.

Pursuant to the Court's Scheduling Order, briefing closed on June 9. ECF 30; ECF 43. More than two weeks later, on June 26, Defendants sought leave to file an additional brief, which was granted. The following day, Defendants proceeded to dump an additional 52 volumes of administrative materials into the record, enlarging the putative administrative record from 7,032 pages to 19,078 pages. The attached certification was signed four days before, *i.e.*, June 23, and it made no attempt to explain the omission of such a vast quantity of material from the original CAR.

ARGUMENT

Defendants have sought to nearly triple the administrative record after the close of briefing. They thereby nakedly seek to sandbag Plaintiffs and the Court. Fortunately, the law protects against such untimely evidence.

A litigant waives or forfeits reliance on evidence that he does not raise in his summary judgment briefing. *Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 389 (7th Cir. 2012); *see also Packer v. Trs. of Ind. Univ. Sch. of Med.*, 800 F.3d 843, 849 (7th Cir. 2015) ("We will not consider factual arguments that were not raised below nor shall we consider evidence that was not properly cited to the court below. * * * [T]he dispositive point is that [the party] did not cite specific parts of that record in support of relevant factual arguments, as the rules required her to do."). That follows from the text

of Rule 56, and Fifth Circuit law is in accord. Fed. R. Civ. P. 56(c)(1)(A), (c)(3); *Am. Family Life Assur. Co. v. Biles*, 714 F.3d 887, 896 (5th Cir. 2013); *see also United States v. Mix*, 791 F.3d 603, 612-613 (5th Cir. 2015) (“The government clearly can forfeit arguments by failing to raise them.”).

Here, the Defendants have inexplicably sought to sandbag Plaintiffs and the judiciary by nearly tripling the size of the administrative record after the close of summary judgment briefing, and they did so only 12 days before the Court’s summary judgment hearing. Obviously, neither party could incorporate that additional material in their briefs. Plaintiffs would be highly prejudiced if those thousands of pages were available to the Defendants in any appeal. Plaintiffs accordingly move that the Court find that Defendants have forfeited any arguments based on the Supplemental CAR.

Dated: July 8, 2025

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rules 7(i) and 7(h), I hereby certify that the parties conferred through counsel telephonically on July 7, 2025. Mr. Gillingham, counsel for Defendants, stated that he believed documents in the supplemental CAR were referenced in documents submitted in the original CAR, noted earlier references to a voluminous record, and believed the Court must act based on the whole administrative record. Mr. Gillingham said he understood why the Plaintiffs needed to file this motion, but the parties were not able to reach an agreement regarding the relief sought in this motion. The motion is accordingly opposed.

/s/ Joseph Scott St. John